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OFFICE OF PETITIONS

In re Application of :
Burford, et al. :
Application No. 10/706,480 : DECISION DISMISSING PETITION
Filed: April 7, 2004 :
Attorney Docket No. 038190/268379 :

This is a decision on the "Petition to Grant Filing Date and to Refund Petition Fee", filed April 7, 2004.

Application papers in the above-identified application were deposited on October 27, 2003. However, on March 29, 2004, the Initial Patent Examination Division mailed applicant a "Notice of Incomplete Nonprovisional Application." Applicants were notified that the application papers had not been accorded a filing date because the application was deposited without a specification. This Notice set a two month period for reply.

In response, on April 7, 2004, Applicants filed the present petition to accord a filing date of October 27, 2003. Applicants asserted that a complete application, including a specification, was filed on October 27, 2003. As proof thereof, applicants have submitted: (1) a copy of the original application transmittal letter, bearing Express Mail Label No. EV 331608718 US, and itemizing the items allegedly filed with the application, including 25 pages of specification; (2) a copy of the Express

Mail label bearing Express Mail Label No. EV 331608718 US and a date-in of October 27, 2003; and (3) a copy of a postcard receipt, itemizing the application, but lacking a USPTO date stamp dated October 27, 2003.¹

The PTO file is the official record of papers originally filed in this application. A review of the official file reveals that a specification was not filed on October 27, 2003, since those papers are not present in the file. An applicant alleging that a paper was filed in the PTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence.

A postcard receipt which itemizes and properly identifies the papers which are being filed serves as *prima facie* evidence of receipt in the Office of all the items listed thereon on the date stamped thereon by the Office. See MPEP 503. **Applicants have not submitted a proper return postcard showing that the application was filed on October 27, 2003.**

Furthermore, petitioner may not rely upon Express Mail under 37 CFR 1.10(e) to establish that the specification was filed with the instant application. MPEP 513 states, in pertinent part:

37 CFR 1.10(e) applies only in those situations in which the correspondence at issue was lost *in toto* (i.e., the entire correspondence was not delivered to the Office). Where there is a dispute as to the contents of correspondence submitted to the Office (e.g., an applicant asserts that three sheets of drawings were submitted under 37 CFR 1.10 with an application, but the Office records indicate receipt of only two sheets of drawings with the application), an applicant may not rely upon the provisions of 37 CFR 1.10(e) to establish what document(s) and/or fee(s) were filed in the Office with such correspondence. Rather, where the records of the Office (e.g., the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g., a postcard receipt under MPEP § 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office.

¹ The postcard receipt did contain a stamp marked "Received October 30, 2003 Licensing and Review."

Here, the application file contains some papers that were filed on October 27, 2003; specifically a Utility Patent Application Transmittal, a Request for Early Publication, a 37 CFR 1.63 declaration, and an IDS.

Accordingly, the petition is DISMISSED.

The application will be accorded a filing date based upon the date that the missing specification was received in the Office, or April 7, 2004.

The application file will be forwarded to the Office of Initial Patent Examination for further processing with a **filing date of April 7, 2004**, using the application papers submitted on October 27, 2003, together with the 25 pages of specification and the 6 sheets of drawings filed on April 7, 2004.

Telephone inquiries related to this decision should be directed to Petitions Attorney Cliff Congo at 703-305-0272.

 for

Charles Pearson
Director
Office of Petitions